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# National Farmers Union Property and Casualty Co. v. Farmers Insurance Group and Farmers Insurance Exchange : Appellant's Reply Brief

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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NATIONAL FARMERS UNION  
PROPERTY AND CASUALTY  
COMPANY,

*Plaintiff and Appellant,*

vs.

FARMERS INSURANCE GROUP  
and FARMERS INSURANCE  
EXCHANGE,

*Defendants and Respondents.*

**FILED**

SEP 10 1962

Case

No. 9625, Utah

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## APPELLANT'S REPLY BRIEF

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APPEAL FROM THE JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT  
FOR SALT LAKE COUNTY, STATE OF UTAH

Honorable A. H. Ellett, District Judge

---

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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NATIONAL FARMERS UNION  
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COMPANY,

*Plaintiff and Appellant,*

vs.

FARMERS INSURANCE GROUP  
and FARMERS INSURANCE  
EXCHANGE,

*Defendants and Respondents.*

Case  
No. 9625

---

## APPELLANT'S REPLY BRIEF

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Plaintiff and appellant, National Farmers Union Property and Casualty Company, submits herewith its brief in reply to defendant and respondents contention as set forth in Point I of Respondent's Brief as follows:

The automobile driven by John H. Morgan, Jr. was being used in the automobile business and, therefore, was not covered by the defendant's policy.

The nature of the case and the disposition thereof in the lower court are set out in both appellant's and respondent's briefs.

## RELIEF SOUGHT

Plaintiff and appellant seeks to have the Supreme Court:

A. Strike Point I of Respondent's Brief and the argument relating thereto, or

B. Sustain the finding and conclusion of the Trial Court on the question dealt with in Point I of Respondent's Brief.

## STATEMENT OF FACTS

The facts are adequately set forth both in Appellant's Brief and Respondent's Brief on the question covered by this Reply Brief.

## ARGUMENT

### POINT I

THE CONTENTION EXPRESSED BY DEFENDANT AND RESPONDENT, FARMERS INSURANCE EXCHANGE, IN POINT I OF RESPONDENT'S BRIEF THAT THE AUTOMOBILE DRIVEN BY JOHN H. MORGAN, JR., WAS BEING USED IN THE AUTOMOBILE BUSINESS AND, THEREFORE, WAS NOT COVERED BY THE DEFENDANT'S POLICY IS NOT BEFORE THE COURT ON APPEAL AND THEREFORE, NOT PROPERLY PART OF RESPONDENT'S BRIEF.

The facts relating to the use of the loaned automobile and the accident which subsequently occurred were submitted to the trial court upon stipulation between counsel for plaintiff and defendant (Tr. 1, 2) and upon hearing

the facts and argument the trial court held that the loaned automobile was not being used in the automobile business at the time of the accident (Tr. 8, 9).

Paragraph 1 of the Conclusions of Law (part of the record in this matter) reflects this finding by the Court.

Inasmuch as it was found as a matter of fact and concluded as a matter of law by the trial court that the use of the automobile by Mr. Morgan was not a use in the automobile business and this finding and conclusion was in favor of plaintiff and against defendant, plaintiff made no appeal from that part of the judgment. Appellant's appeal was taken from the judgment entered in favor of defendant and against plaintiff and upon all questions of law and fact upon the whole record in this cause as it relates to that judgment.

It is not the desire of appellant to have matters reviewed on appeal that have been resolved in its favor at trial. Nor was the matter of use of the automobile in the automobile business dealt with in appellant's brief.

Notwithstanding, respondent did not prosecute a cross-appeal to have this matter reviewed on appeal as it was entitled to do and as provided for in Rules 75 (d) and 74 (b), Utah Rules of Civil Procedure; nor does respondent seek to have the matter of use of the automobile reviewed on appeal for any justifiable reason since the trial court concluded as a matter of law that the automobile was not being so used when the accident occurred (R. 41) and respondent seeks to have the judg-

ment of the trial court sustained. See Respondent's Brief, page 3.

Appellant, therefore, respectfully submits that Point I of Respondent's Brief and the argument relating thereto are not before this Court for purposes of review and therefore cannot and should not be considered by this Court.

## POINT II

THE AUTOMOBILE DRIVEN BY JOHN H. MORGAN, JR. WAS NOT BEING USED IN THE AUTOMOBILE BUSINESS AND, THEREFORE, WAS COVERED BY DEFENDANT'S POLICY.

In discussing the use of automobiles in the automobile business under Point II of this brief, appellant incorporates its argument as set forth under Point I of this reply brief and herewith proceeds to present argument relating to this matter without prejudice to its position as stated therein.

The policy issued by defendant, Farmers Insurance Exchange, to Raymond Earl Thomas, its insured, contains the following provisions:

"Additional definitions under Part I.

(4) Automobile Business. Automobile business means the business of selling, repairing, servicing, storing or parking automobiles, their parts or equipment."

Under the heading of Exclusions Under Part I the policy provides:



“This policy does not apply under Part I:

6. While the described automobile is being used in the automobile business, but this exclusion does not apply to the named insured or his relatives.”

John H. Morgan, Jr. was not the named insured under the policy issued by Farmers Insurance Exchange to Mr. Thomas, nor was he a relative of Mr. Thomas, the named insured. What this means under the provisions of the policy set forth above is that if Mr. Thomas or any of his relatives use the insured vehicle in the business of selling, repairing, servicing, storing or parking automobiles, their parts or equipment, coverage would still be afforded under the policy. However, if Mr. Morgan used the insured automobile for any of the above reasons then the exclusion indicated would be applicable.

It is not enough to say that the insured automobile was being used in the automobile business at the time of the accident and therefore no coverage afforded in this instance, but it must be shown that Mr. Morgan so used the insured car. From the facts as stipulated to by the parties it is abundantly clear that Mr. Morgan was not using Mr. Thomas' car to sell other cars, nor was he using it for the purpose of repairing, servicing, storing or parking other automobiles, their parts or equipment. He was using the loaned automobile for his own personal and private use, not connected with any business transaction, i.e., he was using the automobile he had borrowed to go to his home to enjoy the con-

venience of riding rather than the inconvenience of walking. *The Thomas car was being so used while Mr. Morgan's car was being repaired.*

Appellant therefore asserts that the coverage exclusion applicable when the insured automobile is being used in the automobile business is not applicable in this situation by reason of the terms of the defendant's policy and by reason of the facts of the case.

The question of use of insured automobiles in the automobile business has been dealt with by many jurisdictions. Although the exclusionary provision of the policies scrutinized have been very similar the facts regarding the use to which the insured automobile was put have differed significantly.

*Cherot vs. United States Fidelity and Guaranty Company and Central Surety and Insurance Company*, 264 F. 2d 767 (10th Cir., Okla., 1959), 71 A.L.R. 2d 859, arose out of a declaratory judgment action in which the two appellee insurance companies sought and obtained a declaratory judgment, declaring that they were not required to defend a damage action under policies of insurance which they had issued which action arose out of an automobile accident. U.S.F. & G. had issued its policy to one Schultz on an Auburn make automobile involved in the collision and Central Surety had issued its policy to Mr. Carter, both policies being conventional liability insurance policies. Schultz owned the 1932 Auburn automobile which he left with Carter for repairs.

While the car was being driven by Carter it was involved in the accident in which Cherot was injured.

Carter and Schultz both worked for the same pump company. Carter's hobby was that of being an automobile mechanic and was working on Schultz's automobile for the cost of parts, electricity used, and a small amount for storage. Although there was no agreement as to payment for labor, Schultz testified that he intended to pay Carter for his labor even though no mention had ever been made between them for any charge other than the actual expenses.

The U.S.F. & G. policy provided that it should not apply "to an owned automobile while used in the automobile business." The Central Surety and Insurance Company policy excluded coverage on a "non-owned automobile while used (1) in the automobile business by the insured." Central's policy also contained this provision: "automobile business means the business of selling, repairing, servicing, storing or parking of automobiles."

In reversing the declaratory judgment in favor of the insurance companies, the Circuit Court said:

"We are dealing here with an exclusionary clause. Such provisions are strictly construed. These policies were prepared by the insurance companies. In the absence of a clear showing therein to the contrary, it must be assumed that the word "automobile business" as used in the exclusionary clause means business in the ordinary accepted sense—that is, *an undertaking engaged in with some regularity and for profit and income.*" (Emphasis added.)

In another case with a rather complicated fact situation, National Union Indemnity Company issued its garage liability policy to Al Shallock, Inc. and Shallock Transportation, Inc. American Employers Insurance Company issued its automobile liability policy to Shallock Transportation, Inc., describing a particular automobile. Liberty Mutual Insurance Company issued its automobile liability policy to Sealright, covering an automobile ordinarily driven by one Morrissey, who was an employee of Sealright, and also covering temporary substitute automobiles. The American Employees policy provided that the occupation of the named insured was "contract fleet leasing" and that the purposes for which the automobile was to be used were "pleasure and business." Shallock Transportation, Inc. had authorized Al Shallock, Inc., which operated a garage, to lend the Shallock Transportation, Inc. automobile insured by the American Employees to customers.

Morrissey ordinarily drove a car provided him by Sealright, but had left it at Al Shallock, Inc. garage for repairs, borrowing from Al Shallock, Inc. the automobile owned by Shallock Transportation, Inc., and insured by American Employees. While operating this automobile Morrissey collided with Lubow.

Lubow brought an action for damages against Morrissey, Al Shallock, Inc., National Union, Shallock Transportation, Inc., American Employees and Liberty Mutual. As part of the legal maneuvering that went on in the action Shallock Transportation, Inc. and American Employers moved for summary judgment dismissing the

complaint and cross-complaint on the ground that the garage exception on the omnibus clause excluded coverage and on the further ground that the purpose of use of the automobile was limited to pleasure and business.

On appeal the Supreme Court of Wisconsin reversed that part of the judgment dismissing American Employers holding (a) that the garage exception did not apply because it requires both that the person operating the automobile be an agent or an employee of the garage and that the accident arise out of the operation of the garage, whereas Morrissey was neither the operator nor the agent of the operator of a garage, (b) that the purposes of use declaration did not deny coverage for Morrissey since he was using the automobile for the purposes of his own business, which was neither that of Shallock Transportation, Inc., nor of a garage, since where the vehicle is insured for pleasure and business, that provision referred to the business or pleasure of any person using the automobile, whether the named insured or not. *Lubow vs. Morrissey*, 108 N.W. 2d 156 (Wis. 1961).

From examination of the Cherot and Morrissey cases and considering them as they apply to the case on appeal herein, it is obvious that Mr. Morgan was not using the automobile owned by Mr. Thomas and insured by defendant and respondent in an undertaking that he engaged in with some regularity for profit and income, but for his own transportation to his home. Nor was the automobile put to any use for Bountiful Motor Company by Mr. Morgan. That Mr. Morgan's car was being repaired while the Thomas automobile was being used

is, appellant contends, completely irrelevant to the question being considered.

Other cases dealing with this problem are as follows:

*Stephanelli vs. Yuhas*, 135 Pa. Super. 573, 7 A. 2d 124 (1939). The insurer issued a policy to Jean Walsh covering her automobile. The omnibus clause of the policy provided: "Except that the terms and conditions of this policy shall not be available to a public automobile garage, automobile repair shop, automobile sales agency, automobile service station and the agents and employees thereof." Charles Walsh, husband of the named insured, conducted an automobile repair shop.

Yuhas was employed as a truck driver by a leather company. The truck broke down and Yuhas took it to the repair shop for service. A required tie bolt was not in stock and it was necessary to obtain it in Scranton, a town some distance away. Yuhas stated that he had to go to Scranton for his pay check. Walsh gave Yuhas permission to operate the automobile of Jean Walsh to Scranton to obtain the tie bolt and the pay check. Yuhas was being paid by the leather company for his time.

While Yuhas was on the way to Scranton an accident occurred in which Stephanelli was injured. In an action by the injured person against Yuhas, judgment was recovered against Yuhas. The insurance carrier contended that defendant was an employee of Walsh and as such the car was being used in the automobile business and hence the exclusion applicable.

The trial Court found that Yuhas was not an employee of Charles Walsh and entered judgment against the insurer, who appealed. The Supreme Court affirmed, holding that the evidence warranted a finding that Yuhas was an insured under the policy.

*Employers Mutual Casualty Company of Des Moines, Iowa vs. Federated Mutual Implement and Hardware Insurance Company*, 213 F. 2d 421 (8th Cir., N.D. 1954). Federated issued a garage liability policy to Ulvick's, a corporation engaged at Aneta, North Dakota, in the sale of farm implements and Chevrolet automobiles. The policy covered the corporation and its officers for the use of any automobile "in connection with" the corporation's operations, the use in connection with the corporation's operations of any automobile not owned or hired by the corporation, and the use for "non-business purposes of any automobile \* \* \* in charge of the named insured and used principally in the garage business."

Employers Mutual issued its automobile policy to Lusty covering a 1947 Chevrolet owned by him. Lusty was an employee of the corporation. His car was not used principally in the corporation's business and had never been used by Mr. Ulvick, president of the corporation.

Mr. Ulvick's daughter, who attended the University of North Dakota at Grand Forks, 65 miles from Aneta, with her father's permission, took with her for her personal use a 1951 Chevrolet demonstrator owned by the

corporation. She rendered no service for the corporation either at home or at Grand Forks. The daughter was instructed by her father to call him if the demonstrator gave her any trouble. On December 22, 1951, when the daughter undertook to use the demonstrator to drive home for the Christmas Holidays, it failed to start. She called her father pursuant to his instructions and was told that he would drive to Grand Forks to fix the demonstrator.

Because a corporation owned pickup truck was unusable, Lusty offered his 1947 Chevrolet automobile to Mr. Ulvick. The latter accepted Lusty's offer and placed in the car the necessary equipment for repairing the demonstrator. He intended to fix the demonstrator, have his daughter drive it to Aneta, and, if he had time to do so, look at some equipment for sale at East Grand Forks for possible purchase by the corporation, before he returned to Aneta. He would not have made the proposed trip to East Grand Forks except for his daughter's call.

While Mr. Ulvick was driving Lusty's car on the way to Grand Forks an accident occurred in which several people were injured. The injured sued Mr. Ulvick for damages.

Federated Mutual, the garage corporation and Mr. Ulvick brought an action in the United States District Court for the District of North Dakota seeking a declaratory judgment against the Employers Mutual. The District Court found as a fact that Mr. Ulvick's mission



was a personal one not involving or incidental to the corporation's business and held that Employers Mutual policy covered him and that Federated's did not. Employers Mutual appealed.

The Court of Appeals affirmed holding (1) that if the demonstrator was not being used by the daughter in the garage business the use of Lusty's car to go to its aid would not be use in the operation of the corporation's business, (2) that since Lusty's car was not used principally in the garage business, it was not covered under the garage policy for non-business use, (3) that the District Court was justified in concluding that the contingent possibility of an inspection of garage equipment at East Grand Forks was not even an incidental reason for the trip, (4) that the garage exception in the omnibus clause of the Employer's Mutual policy on Lusty's car therefore did not exclude coverage for Ulvick.

*Commercial Standard Insurance Company vs. Sanders*, 326 S.W. 2d 298 (Tex. Civ. App., 1959). The insurer issued to Sanders its 1956 standard family automobile policy affording collision coverage. Said policy provided that it did not apply "to a loss to a non-owned automobile arising out of its use by the insured in the automobile business." The policy covered Sander's automobile.

Sanders was employed as a car salesman for an automobile dealer in Houston. He had formerly been employed in Madisonville and had left his family there. During the week he lived in Houston but had arranged with his employer's sales manager to drive its demon-

strator from Houston to his home in Madisonville for the weekend. Upon arrival at Madisonville Sanders left his employer's car at his home and used his personal car. He made no effort to sell cars while he was there. On Sunday, Sanders called the sales manager from Madisonville, requesting permission to remain away from work Monday to effect a personal trade of his house in Madisonville for one in Houston.

On Monday, he and the man involved in the real estate negotiation left Madisonville in separate cars to look at the Houston property. While Sanders was making this trip in the employer's car a collision occurred.

This action was brought to construe the insurance policy. Sanders testified that he was "going to bring the car back" to his employer after the trip in question. The Trial Court found that the automobile was not being used by Sanders in the automobile business at the time of the collision. The insurer appealed from an adverse judgment.

The Court of Civil Appeal affirmed, holding that the Trial Court had correctly concluded that Sanders was not using the automobile in the automobile business at the time of the collision.

Other cases dealing with this question are *Chavers vs. St. Paul Fire and Marine Insurance Company*, 188 F. Supp. 39 (U.S.D.C. Ohio, 1960), holding that the operation of a parking lot for patrons by a restaurant where an attendant parked cars with the permission of

the patrons was not a use of the particular car in the automobile business.

*Piliero vs. Allstate Insurance Company*, 12 App. Div. 2d 130, 209 N.Y.S. 2d 90 (1960), affirming 22 Misc. 2d 415, 195 N.Y.S. 2d 89 (1959), also to the effect that an attendant parking cars of patrons of a bakery and restaurant for a fee with knowledge and consent of the owners of the business was not a use of automobiles in the automobile business.

*West Michigan Dock & Market Corporation vs. St. Paul - Mercury Indemnity Company*, 82 F. Supp. 403 (U.S.D.C., Mich., 1949) affirmed without opinion 179 F. 2d 242 (6th Cir.) holding that where an employee of a dock company who drove the insured automobile onto a ramp with the consent of the owner preparatory to its being loaded onto a steamship and where the automobile rolled down the ramp killing a certain person, was not a use of the vehicle in the automobile business nor was the dock company operating a public parking place despite the fact that it occasionally permitted groups using the boats to park their cars on a lot outside the enclosed area owned by the company.

*McCree vs. Jennings*, 155 Wash. 798, 349 P. 2d 1071, where Jennings delivered his automobile for repairs to Richard Miller, an automobile mechanic. After the repairs were completed, Jennings requested that Miller deliver the automobile back to him. The car needed gasoline before it could be returned to its owner. Frank Farrell, a friend who was visiting Miller took the auto-

mobile to have it filled with gasoline and on the way to the service station was involved in a collision with McCree.

McCree filed suit against Jennings, Farrell and Miller and recovered judgment against all three parties and instituted garnishment proceedings against Farrell's liability insurance carrier.

It was contended that the automobile was being used in the automobile business and that insurance coverage was excluded. However, both the trial court and the Supreme Court held that Farrell was merely accommodating a friend, who in turn was accommodating a customer and that the vehicle was not being used in the automobile business. The court stated that:

“\* \* \* an automobile ‘used in the automobile business,’ would be one which was employed for some purpose in connection with that business. For example, a tow truck, an automobile used for demonstration purposes, or a vehicle used for securing or delivering equipment and supplies would be ‘used in the business.’”

*LeFelt vs. Nasarow*, 177 A. 2d 315 (N.J. Super.) holding that a customer's automobile in the custody or possession of an automobile repairman who drives it for the purpose of testing the repairs which he has made is not being used in the automobile business within the meaning of an exclusionary clause in an insurance policy.

For other cases and annotations treating this and allied subjects see 47 A.L.R. 2d 556-557 and 71 A.L.R. 2d 964.

The case of *Canadian Indemnity Company vs. National Insurance Company*, 134 Cal. App. 2d 512, 286 P. 2d 532 (1955) is distinguishable on its facts from the case on appeal herein. In that case the owner of an automobile repair shop and service station borrowed his employee's car to go for some parts that were needed in repairing another vehicle. Before leaving on the errand the owner of the repair shop learned that a friend, a parts salesman who often made the deliveries was ill. The salesman's home and the establishment where the parts were located were in the same general direction and while the owner of the repair shop was on his way to see the ill salesman, before going to pick up the parts, an accident occurred.

The liability insurance policy of the employee of the repair shop owner excluded from coverage any person or organization, or agent or employee thereof, operating an automobile repair shop, etc., "with respect to any accident arising out of the operation thereof," and it was held that such exclusion applied to the situation presented thereby relieving the insurance company from liability.

In the *Canadian Indemnity* case the owner of the repair shop was using the insured automobile while engaged in repairing other automobiles and, in fact, was using the insured vehicle to pick up the parts with which to carry on his business. It should be noted also, that the original and primary purpose of the trip was to pick up automobile parts, the visit to the salesman that was ill being only incidental. Not by any stretch

of the facts or the imagination of respondent in this matter can the situation presented in the Canadian Indemnity case be made to square with the situation presented in the case on appeal herein.

## CONCLUSION

Appellant urges that the question of whether the automobile used by Mr. Morgan was being used in the automobile business is not reviewable by this Court in this appeal and should therefore be stricken from respondent's brief. However, without prejudice to that position appellant contends that the Thomas automobile was not being used in the automobile business at the time of the accident.

If it is contended by respondent that the vehicle was being used in the automobile business at the time of the accident to what business use was it being put and by whom?

Certainly, under the definition of automobile business in respondent's policy no such use was being made of the car, for Mr. Morgan was not even in "the business of selling, repairing, servicing, storing or parking automobiles, their parts or equipment" and was not using the automobile he borrowed from Mr. Thomas for that purpose. No such use of the automobile was being made of the Thomas car as automobile business is described in *McCree vs. Jennings*, for Mr. Morgan was not using the car as a demonstrator or for securing or delivering equipment and supplies. Respondent asserts in its brief that the Thomas automobile was being used in the same

manner that a demonstrator or other vehicle may be used. If so, by whom? Not by appellant's insured, John H. Morgan, Jr., for he was not attempting to demonstrate the advantages of this particular car to anyone. There is no evidence that he even desired to purchase a new car. All that Mr. Morgan desired was that his car be repaired as quickly, efficiently and economically as possible so that he might not experience the inconvenience of being without his own car.

If Raymond Earl Thomas was using the insured automobile as a demonstrator so that he might obtain a sale to Mr. Morgan in the future, and if this use of the car was in the automobile business, then the exclusionary provision in respondent's policy is inapplicable in this situation because the automobile business "exclusion does not apply to the named insured or his relatives."

It cannot be said that Bountiful Motor Company was using the Thomas automobile in the automobile business because when Mr. Morgan asked Kay Browning, the service manager, for the use of a service vehicle while his was being repaired he was advised that no garage automobile was available. The customer, John Morgan, Jr., was referred by the service manager to Dean Roberts, a car salesman, in an effort to obtain the use of Roberts' personal car. Upon being advised that Mr. Roberts' car was not available, Mr. Morgan was then referred to Raymond Earl Thomas for the use of Mr. Thomas' personal car, which he obtained with Thomas' permission, not by authorization of the service manager of Bountiful Motor Company.

In view of the facts, authorities and argument presented, appellant concludes and therefore asserts that this Court should strike Point I and the argument relating thereto in respondent's brief, or in the event the Court should find the matter of use of the insured automobile properly before it for purposes of review, then the decision of the trial court on the matter of use of the automobile should be upheld.

Respectfully submitted,

KIPP AND CHARLIER

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